IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:01.02.2002

Coram:

The Hon'ble Mr. Justice P.K.MISRA

W.P.NO.3554 OF 1998 and W.M.P.NO.5300 OF 1998

Mas Chew Gums (India) Pvt. Ltd.
Regd. Office:
37,Phase IV,SIPCOT Industrial Estate,
Hosur 635 126. .. Petitioner

Vs

The Commercial Tax Officer,
Hosur (North)
Pin 635 126. .. Respondent

Petition filed under Article 226 of the Constitution of India
praying to issue a writ of certiorarified mandamus for the reasons stated
therein.
! For Petitioner .. Mr.S.Ramanathan

^ For Respondents .. Mr.P.Parthasarathy
Govt. Advocate (Taxes)

2.This writ petition is directed against the order passed by the respondent, rejecting the application of the petitioner under Section 55 of the Tamil Nadu General Sales Tax Act (hereinafter called "the Act"). The petitioner, a registered dealer had submitted a return showing the total turnover at Rs.1,76,631/-. He had also claimed that "C" Form exemption should be made available and tax should be reduced to 4 % as "C" Form declaration would be furnished. However, subsequently, at the time of the assessment, "C" Form had not been found and the petitioner had not produced any other material. The Assessment Authority accepted the turnover at Rs.1,76,631/- for the assessment year 1994 -95, but observed as follows:

: ORDER
Heard learned counsels appearing for the parties.

" . . . .
I therefore confirm the above proposal and determine their total and taxable turnover of Rs.1,76,631/- and the tax at 13.8% in the absence of "C" Form declaration on Form "D"."

3.After so observing, the Assessing Authority calculated the tax due at Rs.2,43,750/- and after taking into account the payment of tax of Rs.10,124/-, calculated the balance payable to be at Rs.2,33,626/-, the Assessing Authority levied penalty and directed payment of Rs.3,5 0,439/- by calculating the balance due to be Rs.2,33,626/-. This assessment order dated 28.10.1996 was served on the petitioner on 21.01.1 997. Thereafter, the petitioner filed an application under Section 55 of the Tamil Nadu General Sales Tax Act on 18.02.1998 before the Assessing Authority stating that there has been an error apparent on the face of order by calculating the tax due as Rs.2,43,750/- even though the turnover had been accepted at Rs.1,76,631/-. The said application has been rejected on the ground that there is no mistake of the Assessing Authority in passing the final order, as per the order dated 02.03.1998. This order has been impugned in the present writ petition. Section 55 empowers the Assessing Authority or an Appellate or Revising Authority to rectify any apparent mistake on the face of the record at any time within five years from the date of the order passed by such authority. In the present case, obviously the application has been filed within five years. Section 55 (3-A) even empowers the Assessing Authority to exercise his power even in cases, where his order has been the subject matter of appeal or revision. Therefore, the submission of the learned counsel for the respondent to the effect that without taking recourse to the remedy of appeal, such rectification cannot be made, cannot be countenanced. Sub Section 3-A contemplates that even though an appeal has been filed, the Assessing Authority may exercise such power of rectification. Section 55 of the Act being relevant is extracted here under:

"1. An assessing authority or an appellate or revising authority (including the Appellate Tribunal) may, at any time within five years from the date of any order passed by it rectify any error apparent on the face of the record:

Provided that no such rectification which has the effect of enhancing an assessment or any penalty shall be made unless such authority has given notice to the dealer and has allowed him a reasonable opportunity of being heard.

2.Where such rectification has the effect of reducing an assessment or penalty, the assessing authority shall make any refund which may be due to the dealer.

3.Where any such rectification has the effect of enhancing an assessment or penalty, the assessing authority shall give the dealer a revised notice of assessment or penalty and thereupon the provisions of this Act and the rules made thereunder shall apply as if such notice had been given in the first instance.

3-A.The powers under sub-section (1) may be exercised by the assessing authorities even though the original order of assessment, if any, passed in the matter has been the subject-matter of an appeal or revision.

4. The provisions of this Act relating to appeal and revision shall apply to an order of rectification made under this section as they apply to the order in respect of which such order of rectification has been made."

4.It has been submitted by the learned counsel appearing for the petitioner that having accepted the turnover at Rs.1,76,631/-, the Assessing Authority could not have calculated the tax due to be Rs.2,43,75 0/-. It is further submitted that even assuming that the tax was payable at 13.8% in the absence of "C" Form declaration, the tax due on Rs.1,76,631/- as Rs.24,375/- and not Rs.2,43,750/-. He has therefore submitted that there was obvious mistake, in calculating the amount due as tax in the order of assessment and on the basis of this apparent mistake, the penalty of Rs.3,50,439/- had been calculated.

5.The learned counsel appearing for the respondent submitted that since the order was appealable, the petitioner cannot avail of the provision under Section 55 of the Act and for the aforesaid purpose, the learned counsel for the respondent has relied upon a decision reported in 1989, 72 STC 329; Sneva Diamond Tools(P) Ltd., vs. Appellate Assistant Commissioner (Commercial Taxes), IV Madras City and others.

6.I have carefully considered the decision cited by the learned counsel for the respondent and I do not find anything to the contrary in the aforesaid decision. The aforesaid decision has only emphasised the fact that Section 55 of the Act empowers the authority to rectify only where there is an error apparent on the face of the record such as clerical mistake and is not meant to rectify mistakes which properly come within the jurisdiction of the Appellate Authority that is to say, on matter pertaining to merit of the case. In the decision cited, it was observed "when such a right is available to approach the court for their grievances, they ought to have availed that. Instead of doing that, after the expiry of three years, they had approached the authorities with a petition under Section 55 of the TNGST Act, because under Section 55 of the TNGST Act is only with respect to rectification of error apparent on the face of the record such as clerical errors, typing mistakes etc., Therefore, the petitioner cannot approach the authorities with a petition under Section 55 of the TNGST Act against the order which could be the subject-matter of the appeal or revision."

7.With respect, I may observe that the aforesaid observations were not intended to lay down as a universal rule that in no case, application under Section 55 of the TNGST Act for rectification could be filed, if remedy of appeal is available. What the learned Judge intended to lay down is that where the question of merit of order of assessment is involved and there is no error apparent on the face of the record such as clerical errors, typing mistakes etc., the appellate remedy is to be pursued. This decision is not at all applicable to the present circumstance. In the present case, it appears that there was an inadvertent mistake while calculating the tax due and taking resource to the provision under Section 55 as the most appropriate remedy in such a matter.

8. For the aforesaid reason, the order passed by the respondent cannot be sustained and is required to be modified. The learned counsel for the petitioner does not pursue the matter so far as production of "C" Form is concerned and has submitted that the matter may be finalised by calculating tax at 13.8% as drawn by the Assessing Authority. In view of such submission,

it is directed that the tax payable was Rs.24,375/- and since a sum of Rs.10,124/- had admittedly been paid, the petitioner was liable to pay the bala nce amount of Rs.14,251/- towards tax. The penalty may be accordingly recalculated by the Assessing Authority as per the provisions under Section 12 (3) (b) of the TNGST Act read with Section 9 (2) (a) of the Central Sales Tax Act. The W.P. is accordingly allowed to the extent indicated above.

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To

The Commercial Tax Officer,
Hosur (North)
Pin 635 126.
P.K.MISRA.J

W.P.NO.3554 OF 1998
and
W.M.P.NO.5300 OF
1998

1.2.2002